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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-511

LO-JI SALES, INC.,

Petitioner,

—v.—

STATE OF NEW YORK,

Respondent.

ON WRIT OF CERTIORARI TO THE APPELLATE TERM OF THE SUPREME COURT OF THE STATE OF NEW YORK FOR THE NINTH AND TENTH JUDICIAL DISTRICTS

BRIEF FOR PETITIONER

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BRIEF FOR PETITIONER

Opinions Below

The order of the New York Court of Appeals, denying petitioner's application for leave to appeal, is unreported but is set forth in the Petition for Certiorari, p. 7a. The order of the Appellate Term of the Supreme Court of the State of New York for the Ninth and Tenth Judicial Districts, unreported, is set forth in the Petition for Certiorari, p. 5a. The unreported opinion of the Local Criminal Court, Town of Wawayanda, is set forth in the Petition for Certiorari, p. 1a.

Statement of Jurisdiction

The judgment of conviction was entered on February 3, 1977. The order of the Appellate Term affirming the conviction was entered on April 25, 1978. The petitioner's application for leave to appeal was denied by the New York Court of Appeals on July 5, 1978. The petition for a writ of certiorari was filed on September 26, 1978, and was granted on November 27, 1978.

The jurisdiction of this Court rests on 28 U.S.C. Section 1257(3).

Constitutional Provisions and Statutes Involved

The pertinent portions of the First, Fourth and Fourteenth Amendments to the United States Constitution are set forth in the Appendix to this brief, *infra*, p. 48.

Sections 235.00 and 235.05 of the New York Penal Law (McKinney Supp. 1978-1979) are set forth in the Appendix to this brief, *infra*, pp. 48-50. Section 710.70 of the New York Criminal Procedure Law (McKinney 1971) is set forth in the Appendix to this brief, *infra*, p. 50.

The Questions Presented for Review

I.

Were the petitioner's First, Fourth and Fourteenth Amendment rights violated when eleven state officials, including a local town justice, searched every nook and cranny of petitioner's bookstore and seized over 920 films, publications and other items, under circumstances in which, at the time of the search and seizure, they had a search warrant

which authorized only a search for and seizure of two films, the warrant containing an incomplete additional paragraph the language of which failed to embrace any additional items because it merely authorized the seizure of "the following items which the Court independently has determined [to be obscene]," of which there were none at the commencement of the search and seizure?

II.

Assuming that a search warrant which authorized a seizure of two named films and which contained an incomplete paragraph authorizing seizure of "the following items which the Court independently has determined ["to be obscene"] but which, at the time of the search and seizure, failed to designate any items under that incomplete paragraph lent some color of authority to a search for and seizure of a huge quantity of materials at petitioner's store in addition to the mere two films named in the warrant, did the warrant and search and seizure under it, nevertheless, violate the petitioner's First, Fourth and Fourteenth Amendment rights because:

A. The warrant was issued on the strength of a police officer's affidavit which, insofar as it was concerned with materials other than the two films which were named and had been viewed by the issuing judge, consisted entirely of the police officer's conclusory allegation that there were other items in the petitioner's store, besides the two named films, which were obscene; and/or

B. The warrant was an illegal general warrant?

III.

Even if the foregoing questions were resolved adversely to petitioner, did the seizure of a huge quantity of materials from its bookstore, nevertheless, violate petitioner's First,

Fourth and Fourteenth Amendment rights on the ground that the hasty and superficial on-the-spot examination of small fragments of each of hundreds of films and publications at petitioner's store, none in their entirety, by a local town justice failed to constitute a focusing search on the question of the obscenity of such materials and was an insufficient basis upon which to order their seizure?

IV.

Did the seizure by eleven state officials, prior to an adversary hearing on the question of obscenity, of every copy of every film offered for sale or exhibition to the public at petitioner's store, along with every copy of a substantial number of the books and magazines offered for sale at petitioner's store and every single one of the film projectors used by petitioner to exhibit films, violate petitioner's First, Fourth and Fourteenth Amendment rights?

Statement of the Case

A. Procedural History.

This case is before this Court on a writ of certiorari to review petitioner's conviction on three counts of promoting obscene material under New York State Penal Law §235.05. The case arose out of a massive seizure of materials during the course of a six-hour siege of petitioner's bookstore by eleven state officials, including a local town justice, acting under color of a search warrant which was completed only *after* they had searched for and confiscated over 920 books, magazines, films and other materials. In the trial court, the petitioner timely moved to suppress the evidence obtained during the course of this unconfined search and seizure, but the motion was denied. Subsequently, the petitioner entered a plea of guilty to the three charges and was fined

$1,000.00 on each count for a total of $3,000.00. On appeal to the Appellate Term of the State of New York for the Ninth and Tenth Judicial Districts,[1] petitioner's convictions were affirmed. The petitioner's timely application for leave to appeal to the New York Court of Appeals was denied. This Court then granted certiorari on November 27, 1978.

B. Facts.

On June 20, 1976, Investigator Johannes Hurbanek of the New York state police entered petitioner's bookstore in the Town of Wawayanda, where he purchased two motion picture films entitled "Linda and Duke" and "Four for Dinner" offered for sale there (Tr. 4-5, 44).[2] Five days later, on the morning of June 25th, he went to the district attorney's office for Orange County in Goshen, New York, where he found Town of Wawayanda Justice John O'Connor (Tr. 5). Investigator Hurbanek requested the judge to view the two films which Hurbanek had purchased at petitioner's store, and the judge did so that morning at the prosecutor's office (Tr. 6, 42). Investigator Hurbanek then prepared two affidavits, one for a search warrant and one for a warrant for the arrest, on an obscenity charge, of Alex Mandakis, the clerk who had sold Hurbanek the films (Tr. 6-7). The affidavit in support of the search warrant detailed the purchase of the two films at petitioner's bookstore by Hurbanek, included an allegation that the affiant believed sim-

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[1] Under New York practice, appellate review of the denial of a motion to suppress evidence is available even when the defendant pleads guilty to the charge following the denial of his motion to suppress. N.Y. Crim. Pro. Law §710.70(2) (McKinney 1971).

[2] The abbreviation "Tr." refers to the Transcript of the hearing on the petitioner's motion to suppress evidence.

ilar items were being offered for sale at the petitioner's store, and ended with a curious request that Judge O'Connor join ranks with the police in conducting a raid on petitioner's bookstore. (A. 5a-7a).[3]

Before the affidavits or warrants were signed, Hurbanek and the judge left the prosecutor's office and proceeded to the town of Wawayanda, where they met with a number of police officers at a traffic intersection (Tr. 9). There, Hurbanek signed the affidavits and the judge signed the warrants (Tr. 9). At the time the judge signed the search warrant on the morning of June 25, 1976, it was a two-page document (Tr. 88) and read as follows:

LOCAL CRIMINAL COURT
TOWN OF WAWAYANDA
COUNTY OF ORANGE
STATE OF NEW YORK

HONORABLE JOHN O'CONNOR,
ISSUING JUDGE

TO ANY POLICE OFFICER OF THE NEW YORK STATE POLICE:

You are hereby authorized and directed to search the following premises: a single store brown wood frame building named "Adult Store", located on Route 17M directly across from the Chadwick Motel in the Town of Wawayanda, Orange County, New York.

You are hereby authorized and directed to search for and seize the following property, to wit:

[3] The abbreviation "A." refers to the appendix filed with this brief.

1.) 200 foot reels of 8mm motion picture film entitled LINDA AND DUKE.

2.) 200 foot reels of super 8mm motion picture film entitled FOUR FOR DINNER.

3.) The following items that the Court independently has determined to be possessed in violation of Article 235 of the Penal Law:

This warrant must be executed not more than 10 days after the issuance and any property seized pursuant hereto shall be returned and delivered to the Court without unnecessary delay.

The Court hereby specially determines that this Warrant shall constitute notice to any persons arrested or charged pursuant to its execution, that they are entitled to immediate adversary hearing, as soon as practicable, so that a determination can be made as to whether or not the material seized was possessed in violation of Article 235 of the Penal Law.

DATED: Goshen, New York
June 25, 1976

Local Justice

Armed with this warrant and an arrest warrant, Judge O'Connor, seven state policemen and three members of the prosecutor's office[4] converged on the petitioner's bookstore and conducted what can only be described as a general, exploratory and roving search of every nook and cranny of petitioner's bookstore, from which ultimately more than 860 books, magazines, and films and a total of over 920 items

[4] *See* Tr. 69-72.

altogether were seized and carted away in a truck. (*See* A. 27a-45a).

The search and seizure began at 11:13 a.m. when the raiders entered the petitioner's premises and informed the only employee present, Mr. Mandakis, that he was under arrest and that the state officials possessed a warrant under authority of which they were going to search the bookstore for obscene materials (Tr. 11-12). For the next six hours, the bookstore was under siege by eleven state officials who methodically ransacked every section of the bookstore and seized every available copy of each film and publication that the judge determined to be obscene after a hasty and superficial inspection of a minute portion of each of hundreds of films and publications.

After announcing their general intention to the clerk, Mandakis, the raiders told him that they would begin their search in the area of the store where films are exhibited in private booths to patrons who insert quarters into a device which activates the film projector (Tr. 13). After inquiring of clerk Mandakis whether he had sufficient quarters to activate the film projectors in all 23 booths available for viewing of motion picture films, the clerk, instead, turned on a main switch which allowed the film projectors to be activated without inserting quarters (Tr. 13, 121).[5] Judge O'Connor then went into each of the 22 booths which were operable[6] and viewed two to three minutes of each film (Tr. 97). In no instance did he view any film in its entirety (Tr. 98). Nevertheless, on the basis of viewing a small portion of each film, he determined that all of them were obscene and ordered the seizure of all of the films (Tr.

[5] According to Mandakis' affidavit, attached to petitioner's motion to suppress, he was ordered to turn on the main switch (A. 49a).

[6] One of the booths was inoperable (Tr. 16).

15-16). He did not stop with the seizure of the films, however. He further ordered the seizure of all of the film projectors used to exhibit the films in the booths (Tr. 15-17), despite the fact that, as he conceded at the motion hearing, they were capable of projecting nonobscene material (Tr. 104), and despite the obvious fact that without film projectors the petitioner would be unable to exhibit *any* motion picture film, regardless of its content. Judge O'Connor also ordered the seizure of four of the coin boxes attached to the booths (Tr. 64, 68). In one instance, the policeman who seized one of these coin boxes actually broke a booth in order to retrieve the coin box (Tr. 67).[7]

After completing the seizure in the booth area, Judge O'Connor proceeded to two rooms in the rear of petitioner's premises, where the judge viewed two to five minutes of each of four motion picture films being exhibited in those rooms (Tr. 16-17, 98). Again, after having viewed only a small part of each film, the judge determined that they were obscene and, consequently, ordered the seizure of all of them as well as all of the film projectors used for their exhibition (Tr. 16-17).

While Judge O'Connor collected and seized every one of petitioner's films and projectors in the booth area and the two rear rooms, several of the police officers who occupied petitioner's premises remained in the main room of the store where they busily grabbed books and magazines from display cases and stacked them in piles, in anticipation of an order by the judge to seize all available copies of a large number of publications (Tr. 18-19). Each stack of books represented a different title; if there were five copies of a

[7] Mandakis' affidavit detailed further physical damage done by the police (A. 49a).

particular publication in the petitioner's store, all five would be pulled from the shelf and stacked in one pile (Tr. 18-19).

When Judge O'Connor completed the seizure of films and projectors in the rear of the store, he returned to the main room where books and magazines were offered for sale in four major display areas (Tr. 20). Roving from one section to another, the judge employed the same procedure in each display area until each one of the four sections in the main room had been gutted. He first ordered the police to rip off the sealed plastic which completely enclosed each of the magazines and many of the books in the store (Tr. 19). Then, the judge spent "maybe two maybe ten seconds" on each book or magazine, leafing through "two or three pages, half a dozen pages" of each publication (Tr. 98). In no case did the judge read any book or magazine in its entirety (Tr. 99). Nevertheless, on the basis of a superficial inspection of a minute portion of each publication, the judge was able to make a determination of obscenity, applying a test which he could not even recall at the motion hearing (Tr. 101-102).[8] He then ordered the police to seize not just each

[8] At the hearing, Judge O'Connor first attempted to recite what he understood to be the New York definition of obscenity: ". . . when community standards on a prurient interest of sex, or in deviated ways of sexual patterns. . . ." (Tr. 99) His definition of "prurient" was as follows: "My definition of prurient is what I would call deviated. . . ." (Tr. 100). He defined "deviated" as "expounded to a point where it's vulgar, ridiculous." (Tr. 100). Finally, when he was asked to recite the three-pronged test of obscenity in force in New York, he conceded that he could not recall it without reference to the New York Penal Code (Tr. 101-102). He did state, however, that he had the statute book with him during the raid and that he consulted it (Tr. 101).

Under New York law, town justices are not required to be lawyers. N.Y. Uniform Justice Court Act, Art. 1, §105 (McKinney Supp. 1978-1979). In this case, neither the town justice who issued the search warrant and participated in the raid nor the town justice who presided over petitioner's trial was a lawyer. *See* letter attached as Exhibit A to this brief, *infra*, at 51.

publication he found to be obscene, but also every single copy of each such publication the police could find on the premises (Tr. 20-25) as well as every single copy of each "similar" publication (Tr. 35). Indeed, according to the testimony at the motion hearing, whenever the judge found an item in the store to be obscene, he ordered the seizure of all identical or "similar" items (Tr. 8, 35, 125).

The raiders then moved to the one remaining area of the store which they had not yet searched, the counter area where the cash register was located, and where films and other articles were located behind a glass case (Tr. 26-27). They told clerk Mandakis that they did not intend to view the films in the case, but merely intended to open the boxes in which each of the films was contained (Tr. 26). When Mr. Mandakis informed them that the still photographs on each of the boxes depicted a scene that was part of the film contained in the box, the raiders determined that it was unnecessary even to open the boxes prior to seizing the films (Tr. 26). Instead, solely on the basis of viewing the 3 to 4 inch square still photograph on each of the boxes, the judge determined that in each and every case the 8mm, 200-foot film inside the box was obscene (Tr. 36-38, 123-124). Consequently, he ordered the police to confiscate every single copy of each film located in the glass case (Tr. 26, 36-37).

Finally, the judge ordered the police to seize numerous other articles on the petitioner's premises. For example, the judge ordered the seizure of certain articles of clothing displayed on mannequins in the store, including brassieres and panties, because he found such articles to be obscene (Tr. 103). He found the clothing to be obscene because it was displayed in such a way as to "arouse sexuality" and because the clothing was not, in his opinion, the type com-

monly "used" (Tr. 103). As he stated with respect to the brassieres and panties, "It was of a much frilly, more frilly nature. I don't think I would find my wife buying one, we'll put it that way" (Tr. 104). The judge, therefore, ordered the clothing seized, as well as the ten mannequins on which the clothing was displayed (Tr. 103, 54-55; A. 39a). Other items seized included a ring toss game and a box containing business records (A. 45a).

By the day's end, state officials whose number fluctuated between eleven and fourteen[9] had occupied petitioner's bookstore for six hours and had seized over 860 books, magazines and films and over 920 items altogether under color of a warrant which, at the time of its issuance and execution, specifically identified but two films for seizure, both of which the state officials already had in their possession prior to the search (Tr. 35). The state officials had virtually seized and closed the entire bookstore for a six-hour period. Although Investigator Hurbanek insisted, in his testimony at the motion hearing, that during the raid petitioner's store was open for business (Tr. 28), the fact of the matter is that at all times there were two or three marked police cars outside the store and three of the state officials who raided petitioner's store were uniformed policemen (Tr. 31). Furthermore, not a single sale was made to a customer during the entire six-hour period, and no customer who had the courage to venture into the bookstore remained after becoming aware of the presence of police officers (Tr. 31). In fact, during the six-hour period in which they occupied the petitioner's bookstore, the police actually harassed any potential customers who did happen into the store by compelling them to display to the police some identification (Tr. 32).

[9] Tr. 69-70.

After the state officials finally left petitioner's premises with its entire stock of films and projectors, most of its inventory of books and magazines and its clerk, who was under arrest, the police returned to their barracks and the judge went elsewhere (Tr. 71). Shortly thereafter, two typists from the district attorney's office appeared at the police barracks (Tr. 46). There, out of the presence of the judge who had signed the search warrant many hours earlier, additions were made to the warrant so as to include within its authorization all of the items which had been seized earlier at petitioner's bookstore (Tr. 12). As the police announced the title or other description of each item that had been seized, one typist inserted it in the inventory and the other typist added it to paragraph three of the search warrant (Tr. 46). Thus, the search warrant was transformed, after the search and seizure, from the two-page document it had been at the time the judge signed it to a document consisting of sixteen pages (Tr. 34-35; 48-49).

Later that evening, at approximately 11:00 p.m., Judge O'Connor saw for the first time the completed warrant he had signed more than twelve hours earlier (Tr. 85). He assumed that the additions to the warrant had been based on a list he had seen Investigator Hurbanek make in longhand during the course of the search and seizure (Tr. 96). But since Hurbanek had not included in his list the number of copies of each film or publication seized, the judge conceded that he was not even able to verify that the warrant as modified accurately and completely reflected the materials whose seizure he ordered (Tr. 97).

The materials seized from petitioner's store formed the basis of a criminal complaint charging petitioner with three counts of Obscenity in the Second Degree under N.Y. Penal Law §235.05. It is the petitioner's conviction on these three

counts, following the denial of petitioner's motion to suppress, which is before this Court for review.

Summary of Argument

I.

At the time of its issuance and execution, the search warrant in this case authorized the seizure of two named films as well as "the following items that the Court independently has determined [to be obscene]." But the judge had not determined, prior to the commencement of the search, that any materials, other than the two specifically named films, were obscene. Consequently, at the time the search commenced, there existed no film, publication or other item even arguably embraced within the language of the last paragraph of the warrant. The warrant on its face, therefore, authorized nothing more than a search for and seizure of two films. Petitioner submits, therefore, that the general search for and seizure of a huge number of additional items was nothing more than an illegal warrantless search and seizure because, at the time it occurred, there existed no warrant authorizing it.

II.

Even if the warrant could be interpreted as lending some color of authority to a search for and seizure of materials other than the mere two films identified in it, the warrant and search and seizure under it was, nevertheless, unlawful.

A.

First, it issued on the strength of a police officer's affidavit which, insofar as it was concerned with materials other than the two films identified in the warrant and which

the issuing judge had viewed, consisted solely of the police officer's conclusory allegation that other items in the petitioner's store were obscene. This Court has repeatedly held that a police officer's conclusory assertion of obscenity is an insufficient basis upon which to issue a search warrant for materials presumptively protected by the First Amendment. *Marcus* v. *Search Warrants,* 367 U.S. 717 (1961); *Lee Art Theatre, Inc.* v. *Virginia,* 392 U.S. 636 (1968); *Roaden* v. *Kentucky,* 413 U.S. 496 (1973); *Heller* v. *New York,* 413 U.S. 483 (1973). Under this Court's decisions, the affidavit failed to establish probable cause.

In order to sidestep this Court's prior decisions in the present case, it would be necessary, therefore, to make an argument that would distinguish between the probable cause necessary to justify a *search* for allegedly obscene materials and that which is necessary to justify a *seizure* of such materials, by urging that judicial scrutiny need only precede a seizure of, but not a search for, obscene materials and by claiming that Judge O'Connor did scrutinize the materials in this case prior to seizure. This Court has never drawn a distinction between the probable cause needed to search and that which is required to seize, however, in any context, let alone in the setting of a search and seizure involving films and books, which ". . . calls for a higher hurdle in the evaluation of reasonableness" under the Fourth Amendent. *Roaden, supra,* at 413 U.S. 504. Moreover, the Court has recognized that the power of search as well as the seizure power could be an "instrument for stifling liberty of expression," *Marcus, supra,* at 367 U.S. 729, as amply demonstrated by this case, where eleven state officials literally padlocked petitioner's entire store for six hours during their unconfined search. Accordingly, any claim that the search power may be exercised on a lesser

showing of probable cause than is required for the exercise of the seizure power is untenable. In any event, such a contention would not save the warrant here, for Judge O'Connor never did scrutinize the materials he ordered seized, but merely glanced at isolated fragments of each of the films and publications.

Nor does this case bear any resemblance to *Heller, supra,* where a search warrant issued only *after* the judge there had viewed the film in question in its entirety. Here, the search warrant issued *before* any judicial scrutiny, solely on the strength of a police officer's bald assertions.

B.

Second, the warrant, by its inclusion of the open-ended and unrestrictive language of its last paragraph, directly conflicted with the Fourth Amendment's unambiguous requirement that a warrant particularly describe the items whose seizure is authorized. This Court has recognized that the particularity requirement of the Fourth Amendment "is to be accorded the most scrupulous exactitude when the 'things' are books, and the basis for . .eir seizure is the ideas which they contain." *Stanford* v. *Texas,* 379 U.S. 476, 485 (1965). The warrant here was nothing more than a general warrant, the constitutional deficiency of which was not, and could not be, cured either by the presence of the issuing judge during the course of its execution or by the additions made to the warrant after the search and seizure had been completed.

III.

Even if the foregoing deficiencies could be ignored, however, the search and seizure would still have been constitutionally defective, because the judge's on-the-spot determinations as to what materials should be seized was neither designed to focus searchingly on the obscenity *vel non* of the materials before him nor adequate to protect non-obscene material. His superficial examination of small fragments of each of the hundreds of items he ordered seized defied this Court's clear pronouncements that in judging the obscenity of a work, it must be considered as a whole, and was simply an insufficient basis upon which to order the seizure of such materials.

IV.

Moreover, the eleven state officials did not limit their seizure to the single evidentiary copy of each film and publication needed for prosecution. Rather, they seized every single copy of each film or publication thought to be obscene, thereby putting an abrupt and complete halt to the distribution and circulation of numerous films and publications prior to an adversary hearing on the question of obscenity, in violation of the First Amendment, a course of conduct which rendered the seizure unreasonable and, therefore, violative of the Fourth Amendment as well.

ARGUMENT

I.

THE SEARCH FOR AND SEIZURE OF ITEMS OTHER THAN THE TWO FILMS IDENTIFIED IN THE WARRANT AT THE TIME OF ITS ISSUANCE WAS NOTHING MORE THAN AN ILLEGAL WARRANTLESS SEARCH AND SEIZURE.

At the time Judge O'Connor issued a search warrant in this case, the warrant, in its first two paragraphs, authorized the search for and seizure of two named films at petitioner's store and, in its third paragraph, authorized the search for and seizure of "(t)he following items that the Court independently has determined to be possessed in violation of Article 235 of the Penal Law". It is uncontroverted that when the warrant was issued no materials other than the two films identified in the warrant had been the subject of a determination of obscenity by the judge. Consequently, at the time the warrant was issued and the search commenced, there existed no film, magazine or other item even arguably embraced within the language of paragraph three of the warrant. Accordingly, there existed no warrant authority for the state officials to search for or seize anything other than two films. Nonetheless, on the basis of an arrest warrant and the search warrant which authorized a search for and seizure of but two motion picture films, eleven state officials invaded petitioner's business establishment, immediately placed the only employee on the premises under arrest, and announced their intention to search the petitioner's entire premises indiscriminately for evidence of criminal activity, an intention which the state officials executed for the next six hours (Tr. 11-12, 69-70). In view of the fact that these state officials possessed authority to search for and seize merely two films, petitioner

submits that the general search for and seizure of a huge quantity of other materials amounted to nothing more than an illegal warrantless search and seizure, because, at the time the search for and seizure of those other materials took place, there simply existed no warrant which authorized it.

In a long line of unbroken decisions, this Court has consistently held that a search and seizure not authorized by a prior obtained search warrant is inherently unreasonable under the Fourth Amendment, except in a small number of narrowly defined circumstances. *See United States* v. *Chadwick*, 433 U.S. 1 (1977); *Coolidge* v. *New Hampshire*, 403 U.S. 443, 454-455 (1971); *Katz* v. *United States*, 389 U.S. 347, 357 (1967); *Camara* v. *Municipal Court*, 387 U.S. 523, 528-529 (1967); *Stoner* v. *California*, 376 U.S. 483 (1964). Furthermore, this Court has consistently recognized that this fundamental principle protects the security of business premises as well as homes. *See Marshall* v. *Barlow's, Inc.*, 436 U.S. 307 (1978); *G. M. Leasing Corp.* v. *United States*, 429 U.S. 338 (1977); *See* v. *City of Seattle*, 387 U.S. 541 (1967); *Go-Bart Co.* v. *United States*, 282 U.S. 344 (1931); *Silverthorne Lumber Co.* v. *United States*, 251 U.S. 385 (1920).

Here, in addition to and beyond the search for and seizure of the mere two films whose seizure was authorized by a warrant, an army of state officials went on to conduct an unconfined and general search of the petitioner's entire business premises; they explored every room (Tr. 15-17, 20-27); they sifted through hundreds of films and other items enclosed in a glass case behind the cash register (Tr. 26-27, 36-38); they ransacked business documents contained in a box on the premises (A. 45a); they tore off cellophane wrappers which sealed and completely enclosed hundreds of magazines and books and took possession of these publica-

tions by physically removing them from shelves and stacking them in piles, thereby effecting an immediate search and seizure of them (Tr. 18-19); they harassed potential customers by compelling them to identify themselves (Tr. 32); and they physically carted away over 920 books, magazines, films and other items (A. 27a-45a). All of this conduct of state officials, which was in addition to and beyond their search for and seizure of the two films for which they had a warrant, occurred notwithstanding the nonexistence of a prior obtained warrant to authorize it. In short, it was a warrantless search and seizure of massive scope.[10]

The search for and seizure of materials other than the two films for which there was a warrant in this case was clearly an unlawful warrantless search and seizure. Accordingly, the petitioner's motion to suppress should have been granted by the trial court and the petitioner's conviction, based on constitutional error, should be reversed by this Court. *Mapp* v. *Ohio,* 367 U.S. 643 (1961); *See also Andresen* v. *Maryland,* 427 U.S. 463 at 482, n. 11 (1976).

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[10] Certainly the judge's participation in the search and seizure did not cure the constitutional deficiency, for the Fourth Amendment no more permits the judiciary to conduct warrantless searches and seizures than it allows the executive branch to do so. A warrantless search and seizure by a judge represents no less an arbitrary governmental intrusion than does a warrantless seizure by a police officer. Indeed, the intrusion is even more arbitrary and threatening to a citizen when a judge, to whom the citizen would otherwise turn for enforcement of his constitutional right to be free from warrantless searches and seizures, himself participates in the constitutional violation. In short, judges are not exempt from the Fourth Amendment's prohibition against warrantless searches and seizures even in an ordinary criminal investigation, let alone one involving a search for and seizure of books and films, where this Court has fashioned even more stringent warrant requirements. *See Roaden* v. *Kentucky,* 413 U.S. 496 (1973); *Lee Art Theatre, Inc.* v. *Virginia,* 392 U.S. 636 (1968); *Marcus* v. *Search Warrants,* 367 U.S. 717 (1961). Allowing judges to search and seize without warrants would effectively work a repeal of the Fourth Amendment.

II.

EVEN IF THE WARRANT COULD BE INTERPRETED AS LENDING SOME COLOR OF AUTHORITY TO A SEARCH FOR AND SEIZURE OF MATERIALS OTHER THAN THE TWO FILMS SPECIFICALLY IDENTIFIED IN IT, THE WARRANT, NEVERTHELESS, VIOLATED PETITIONER'S FIRST, FOURTH AND FOURTEENTH AMENDMENT RIGHTS.

A. No Probable Cause Existed For The Issuance Of A Warrant Authorizing A Search For And Seizure Of Any Materials Other Than The Two Films Specifically Identified In It.

The affidavit submitted by Investigator Hurbanek in support of the search warrant at issue in this case contained a brief description of the two films he had purchased at petitioner's store and which Judge O'Connor viewed prior to the issuance of the warrant (A. 6a). The only other information included in the affidavit was Hurbanek's conclusory assertion that other films, magazines and books in the store were obscene, based upon his belief that they were similar to the two films he had purchased (A. 6a-7a). The affidavit failed to identify a solitary one of these other items either by title or by location in the store, however, nor did the affidavit include a description of the contents of even one of these other films or publications. Therefore, even if the search warrant were to be read as authorizing a search for and seizure of materials in addition to the two identified films, in derogation of its plain language, it would, nevertheless, be constitutionally invalid because it was issued on the basis of a police officer's conclusory allegation rather than upon a focusing search by a neutral and detached magistrate on the question of the obscenity of the materials whose seizure was sought.

This much has been clearly settled by this Court's decisions; The First and Fourth Amendments bar the issuance of search warrants for the seizure of books, magazines and films based solely upon the conclusory allegations of a police officer. *Marcus* v. *Search Warrants,* 367 U.S. 717 (1961); *Lee Art Theatre, Inc.* v. *Virginia,* 392 U.S. 636 (1968); *Roaden* v. *Kentucky,* 413 U.S. 496 (1973); *Heller* v. *New York,* 413 U.S. 483 (1973). Because free expression may be the loser, more stringent procedures leading up to the issuance of warrants for the seizure of allegedly obscene material must be followed than are required for the seizure of other forms of contraband. *A Quantity of Books* v. *Kansas,* 378 U.S. 205 (1964); *Marcus, supra; Roaden, supra.* Only a procedure which enables a neutral magistrate to focus searchingly on the question of obscenity assures the "necessary sensitivity to freedom of expression," *Freedman* v. *Maryland,* 380 U.S. 51, 58 (1965), which is a constitutional prerequisite to the issuance of a search warrant for allegedly obscene matter. *Marcus, supra; Lee Art Theatre, supra; Roaden, supra.*

In the present case, however, no facts were set forth in the affidavit on the basis of which the judge could give careful consideration to the question of obscenity prior to issuing the warrant. Insofar as it was concerned with materials in the petitioner's store other than the two films specifically identified, the affidavit was virtually indistinguishable from the ones found constitutionally insufficient by this Court in *Marcus* and *Lee Art Theatre.*[11] Under this Court's clear holdings, the affidavit in this case, consisting solely of a police officer's conclusory allegations,

[11] Indeed, in *Lee Art Theatre,* unlike the present case, the affidavit at least identified the titles of the materials thought by the policeman to be obscene.

was insufficient to justify the issuance of a warrant for the seizure of materials in addition to the two identified films which the judge had viewed.

Accordingly, if the warrant authorizing the search for and seizure of other materials in this case is to be defended, that defense must rest upon an argument that would draw a distinction between the probable cause necessary to justify a *seizure* of expressive material for its allegedly obscene content and the probable cause necessary to justify a *search* for such material. In essence, the argument would be that judicial scrutiny of allegedly obscene materials need not precede a governmental search for them, but must only precede a seizure of such materials; and that the focusing search by a magistrate on the question of obscenity which is a precondition of a lawful seizure of allegedly obscene materials may properly occur during the course of a governmental intrusion in the form of a search which has been authorized solely on the strength of a police officer's bald assertions. However, this argument, necessary to sidestep this Court's prior decisions, is without merit for a number of reasons.[12]

First, even assuming that the rule of constitutional law upon which such an argument would have to be constructed

[12] The only other conceivable argument that could be devised to defend the warrant would be that probable cause is not a prerequisite to the issuance of a warrant in the execution of which a judge is to participate. Such an argument is untenable. The probable cause requirement guarantees that citizens will not have their homes or businesses invaded *at all,* unless the government has good reason to do so. *Coolidge* v. *New Hampshire,* 403 U.S. 443, 467 (1971); *See* Amsterdam, *Perspectives On The Fourth Amendment,* 58 Minn. L. Rev. 349, 411 (1974). Thus, the identity of the government intruder has no bearing on the probable cause requirement. The Fourth Amendment states that *no* warrants shall issue but upon probable cause. It recognizes no exception for warrants which are to be executed by a judge.

were sound, which it is not, the record in the present case would fail to support its application here. Initially, it would apply only if there had been no seizure of films or publications in the present case until after Judge O'Connor had inspected them while on the petitioner's premises. The record is to the contrary, however, for the petitioner's entire store was literally seized and closed as soon as the eleven state officials invaded it, placed the clerk under arrest, stationed uniformed guards both inside and outside the premises, and chased away any potential customers by compelling them to display identification and by the very presence of a battalion of policemen (Tr. 31-32). Thus, in essence, the store's entire inventory of publications and films was seized and under the state's exclusive control before Judge O'Connor had seen a single film or publication. Furthermore, policemen seized hundreds of particular books and magazines before the judge glanced at a single one of them, by pulling them from display cases, tearing off the sealed plastic wrappers which completely enclosed them, and stacking them in piles on the floor (Tr. 18-19). Additionally, Judge O'Connor never did focus searchingly on the question of the obscenity of any of the hundreds of materials ultimately carted away from petitioner's premises. His hasty and superficial inspection of minute portions of the seized publications and films hardly satisfied the constitutional requirement of a focusing search on the question of obscenity which is a constitutional prerequisite to a valid seizure.[13] Thus, since the seizure preceded the judge's "inspection" of the materials, and since, in any event, that inspection was constitutionally insufficient, the rule of constitutional law which would have to be urged in order to avoid application of this Court's

[13] This deficiency is discussed more fully below at pp. 36-41.

prior decisions concerning the probable cause necessary to permit the issuance of a search warrant for allegedly obscene materials would not even apply here.

Second, the rule of constitutional law which would have to be urged in an attempt to justify the warrant here has no support in either the language of the Fourth Amendment or in this Court's decisions. The basic premise of the argument is that a search for an item may constitutionally be authorized upon a lesser showing of probable cause than would justify a seizure of the same item. But the language of the Fourth Amendment, unambiguous on this point, applies with equal force to both searches and seizures. Neither may be effected without probable cause. *See Carroll* v. *United States,* 267 U.S. 132, 149 (1925); *Brinegar* v. *United States,* 338 U.S. 160, 174 (1949); *Coolidge* v. *New Hampshire,* 403 U.S. 443, 467 (1971). Nor has this Court drawn any distinction in its decisions between the probable cause necessary to warrant a search in a given situation and that which is necessary to warrant a seizure, but rather, the Court has always viewed the probable cause requirement to be the same for either. *See Zurcher* v. *Stanford Daily,* 436 U.S. 547, 553-560 (1978).[14]

Such a rule would also be at odds with the principle established by this Court in *Marcus, supra,* and *Lee Art Theatre, supra,* that a search warrant for the seizure of films or publications may not issue upon the conclusory asser-

[14] Permitting a search for allegedly obscene materials on a lesser showing of probable cause than is necessary to authorize seizure of those materials, for the specific purpose of gaining the additional evidence necessary to authorize the seizure, would also be tantamount to justifying a search and seizure on the basis of "what it turns up". *Bumper* v. *North Carolina,* 391 U.S. 543, 548 n. 10 (1968). This Court long ago rejected such a notion. *Byars* v. *United States,* 273 U.S. 28, 29 (1927); *United States* v. *Di Re,* 332 U.S. 581 (1948); *Henry* v. *United States,* 361 U.S. 98, 103 (1959).

tions of a police officer. While the specific facts in *Marcus* and *Lee Art Theatre* involved searches *and* seizures of allegedly obscene materials prior to any judicial scrutiny of the materials, there is no indication in the Court's opinions in those cases that the searches for the materials were any more proper than the seizures. Indeed, in those decisions, the Court recognized that it was the abuse of the power of search as well as the seizure power by governments to suppress unpopular sentiments which, in large measure, led to the adoption of the Fourth Amendment:

> "The use by the government of the power of *search* and seizure as an adjunct to a system for the suppression of objectionable publications is not new. Historically the struggle for freedom of speech and press in England was bound up with the issue of the scope of the *search* and seizure power.
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> "The Bill of Rights was fashioned against the background of knowledge that unrestricted power of *search* and seizure could also be an instrument for stifling liberty of expression." *Marcus, supra,* at 367 U.S. 724, 729 (Emphasis added).

The instant case is concrete proof that the power of search can be used as an instrument for stifling liberty of expression. The six-hour siege by eleven state officials here put an abrupt and lengthy halt to the exhibition of numerous films and to the circulation of hundreds of publications and films, all presumptively protected by the First Amendment. During the search, potential customers were harassed and deprived of their First Amendment right to have access to reading and viewing materials. Had the state officials left petitioner's premises without taking a

single film or publication with them at the conclusion of the six-hour search, they would still have succeeded in choking free expression solely by the exercise of the search power, under authority of a warrant which issued on the conclusory allegations of a police officer.

Because the power to search, no less than the power to seize, is an effective tool by which unpopular, but constitutionally protected, ideas can be suppressed, any notion that the search power may be exercised on a lesser showing of probable cause than is necessary for the lawful exercise of the seizure power must be rejected as unsupportable by the history which led to the adoption of the Fourth Amendment, by the language of the Amendment itself and by the decisions of this Court interpreting it, particularly those decisions which establish the principle that even more stringent probable cause requirements must be met when the object of a search is a book or film.[15]

Nor, contrary to New York's assertion in its brief submitted in opposition to the petition for certiorari, does the present case bear any similarity to what occurred in *Heller* v. *New York,* 413 U.S. 483 (1973). In *Heller,* at the request of an assistant district attorney, a judge went to a com-

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[15] Moreover, if this Court were to accept the novel proposition that a search for allegedly obscene materials is justified by a lesser showing of probable cause than would permit a seizure of such materials, the question would still remain as to what facts must be developed to satisfy this newly contrived concept of probable cause. Petitioner submits that the affidavit in the present case would not have been sufficient to establish probable cause as to the materials other than the two films which the judge viewed, even applying the more relaxed standard of probable cause necessary to permit searches and seizures in cases not implicating First Amendment values. Thus, unless this Court is prepared to permit searches for books and films on a showing which would not even justify searches for firearms, drugs and other forms of contraband, the warrant at issue here cannot be saved by drawing a distinction between searches and seizures.

mercial motion picture theater in New York and purchased a ticket for admission. He took a seat among the other patrons, who numbered approximately 100, and viewed, in its entirety, the film being exhibited at the theater. After the film had ended, and based upon his finding that there was probable cause to believe the film to be obscene, the judge signed a search warrant authorizing a search for and seizure of the film. Police officers then executed the warrant by seizing a single copy of the film. In this Court, the petitioner's sole argument was that the seizure of the film under those circumstances was unconstitutional because it occurred prior to an adversary hearing on the question of obscenity. This Court rejected that argument, in view of the fact that a neutral and detached magistrate had viewed the film in its entirety and had focused searchingly on the question of its obscenity prior to issuing a search warrant, and in view of the further fact that the seizure had been limited to a single evidentiary copy.

This Court did not, in *Heller,* retreat from, but rather reaffirmed, its position that a search warrant authorizing a search for and seizure of allegedly obscene material may not issue on the strength of a police officer's conclusory allegation, but may issue only under a procedure which is designed to enable a magistrate to focus searchingly on the question of the obscenity of the material whose seizure is sought. In *Heller,* unlike the present case, a search warrant was issued only *after* such a procedure had been followed.

By way of contrast, in the present case, the search warrant issued *before* Judge O'Connor viewed any of the hundreds of films and publications which were not identified in the warrant at the time of its issuance, but which he, nevertheless, ordered to be seized under its authority. Here, unlike *Heller,* the search warrant issued upon a police officer's conclusory allegations. When the eleven state officials invaded petitioner's premises under a claim of governmental authority in the form of a search warrant, no magistrate had focused searchingly on the question of the obscenity of any of the huge number of materials not mentioned in the warrant but ultimately seized under it.[16] Here, a squadron of state officials assumed complete dominion and control over the petitioner's entire business premises, harassing potential customers, ransacking films enclosed in a glass case behind the cash register and ripping off the sealed plastic which enclosed the magazines and books on the petitioner's premises, all under color of a search warrant which, insofar as it was concerned with materials other than the mere two films identified in it, had issued on the conclusory assertion of a police officer. Any claim that the procedure followed in this case finds any support in *Heller* is, therefore, completely without merit.

In the present case, no probable cause existed for the issuance of a warrant authorizing a search for or seizure of any materials other than the two films identified in it and which the judge had viewed.[17] Accordingly, the petitioner's

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[16] No contention was ever made in *Heller* that any search of the petitioner's premises there had occurred prior to the issuance of the warrant, which did not happen until after the judge had viewed the film in its entirety. No claim was made in this Court that the judge was engaged in a search when, upon paying the admission price, he viewed the film. During the time that the judge was on the petitioner's premises in *Heller,* his claim of right to be there was no greater than that of any other paying customer and he certainly was not there under any claim of governmental authority. In the present case, of course, eleven state officials entered petitioner's store and occupied it for six hours under a claim of governmental authority.

[17] Indeed, there was not even a valid reason for the issuance of a search warrant for the seizure of the two films the judge had viewed, because the state already had evidentiary copies of those

motion to suppress the evidence obtained under color of that improperly issued warrant should have been granted. *Mapp* v. *Ohio, supra.* Petitioner, therefore, urges this Court to reverse its conviction.

B. The Warrant Was An Illegal General Warrant.

The search warrant in this case, both at the time of issuance and at the time of execution, contained an incomplete third paragraph authorizing the search for and seizure of "[t]he following items that the Court independently has determined to be possessed in violation of Article 235 of the Penal Law" (Tr. 86). No items were listed under this language in the warrant, however, until *after* the completion of the search and seizure. Yet it was ostensibly under authority of this language that eleven state officials converged upon the petitioner's establishment and seized from it a huge quantity of films, magazines, books, projectors, coin devices, clothing, mannequins and assorted other items. Under these circumstances, petitioner submits that, aside from the lack of probable cause for the issuance of a warrant to seize materials other than the two films which the judge had viewed, the inclusion in the warrant of the open-ended and unrestrictive language of its third paragraph rendered the warrant invalid on its face, because it failed to describe with particularity the items whose seizure it authorized, in direct contravention of the Fourth Amendment. The warrant was nothing more than a general warrant of the most pernicious kind and precisely the type of warrant the use of which it was the mission of the Fourth Amendment to bar forever.

films. The only purpose served by the seizure of additional copies of those films was an illegal purpose—to block exhibition and circulation of those films prior to an adversary hearing, in violation of the First Amendment. *See Heller, supra,* at 413 U.S. 492. Thus, the entire warrant violated the First Amendment and, because a warrant which authorizes a seizure which is in direct conflict with the First Amendment is obviously not reasonable, the Fourth Amendment as well.

The history of the unchecked abuses attendant to the use of general warrants, known as writs of assistance, both in England and in the colonies prior to the revolution has been fully chronicled in numerous decisions of this Court. *See Boyd* v. *United States,* 116 U.S. 616 (1886); *Frank* v. *Maryland,* 359 U.S. 360 (1959); *Marcus, supra; Stanford* v. *Texas,* 379 U.S. 476 (1965); *Marshall* v. *Barlow's, Inc.,* 436 U.S. 307 (1978). Suffice it to say, the hated general warrant was a leading cause of the American revolution and was the precise evil against which the Fourth Amendment was directed. *See Stanford* v. *Texas, supra,* at 379 U.S. 481-482. Moreover,

> "[w]hat is significant to note is that this history is largely a history of conflict between the Crown and the press. It was in enforcing the laws licensing the publication of literature and, later, in prosecutions for seditious libel that general warrants were systematically used in the sixteenth, seventeenth and eighteenth centuries." *Id.,* at 379 U.S. 482. *See also Zurcher* v. *Stanford Daily, supra,* at 436 U.S. 564.

For this reason,

> ". . . the constitutional requirement that warrants must particularly describe the 'things to be seized' is to be accorded the most scrupulous exactitude when the 'things' are books, and the basis for their seizure is the ideas which they contain." *Stanford* v. *Texas, supra,* at 379 U.S. 485. *See also Marcus* v. *Search Warrants, supra; A Quantity of Books* v. *Kansas, supra.*

In the case at bar, however, the warrant was completely lacking in the particularity required by the Fourth Amendment. It constituted a "roving commission" for eleven state officials to "search where they pleased" for whatever they chose to confiscate. *Stanford* v. *Texas, supra,* at 379 U.S. 482. Under its broad authority they seized hundreds of books, magazines and films; they seized film projectors, coin boxes, business records, clothing, mannequins, rubber goods, aerosol cannisters of tear gas and even a ring toss game (A. 27a-45a).

Nor was the constitutional deficiency of the warrant overcome by the presence of the issuing judge during the course of the execution of the warrant at petitioner's premises. It is true that one of the purposes served by the particularity requirement of the Fourth Amendment is to remove from the officers executing the warrant any discretion as to what is to be taken under it. *See Marron* v. *United States,* 275 U.S. 192, 196 (1927); *Andersen* v. *Maryland,* 427 U.S. 463, 480 (1976); *Marcus, supra,* at 367 U.S. 732. It might be argued, therefore, that the issuing judge can check the discretion of the officers executing the warrant as effectively by being present at the search and requiring the executing officers to obtain his approval as to each item they propose to seize, prior to seizure, as he can by specifying with particularity in the warrant those items whose seizure is authorized. But such an argument presupposes that the issuing judge acts at all times in a neutral, detached and judicial fashion, independent of the enforcement branch of government. In the instant case, however, the issuing judge was not present at petitioner's premises merely to rule on requests of the executing officers for authority to seize particular items. Rather, the judge himself assumed the role of an executing officer as he participated fully, with seven policemen and three members of the prosecutor's office, in the search and seizure itself. Indeed, the judge's participation in the actual search and seizure was greater than that of any of the other state officials who occupied petitioner's premises. In the truest sense, the judge had joined ranks with the law enforcement branch of government to engage " . . . in the often competitive enterprise of ferreting out crime." *Johnson* v. *United States,* 333 U.S. 10, 14 (1948).

Moreover, besides removing discretion from the officers executing the warrant as to what items to seize, the particularity requirement of the Fourth Amendment serves other important functions, none of which can be served as effectively by the presence of the issuing judge during the search. Most importantly, the particularity requirement is designed to make general searches impossible. As this Court stated in *Andresen* v. *Maryland,* 427 U.S. 463, 480 (1976):

> "General warrants, of course, are prohibited by the Fourth Amendment. '[T]he problem [posed by the general warrant] is not that of intrusion per se, but of a general, exploratory rummaging in a person's belongings . . . [The Fourth Amendment addresses the problem] by requiring a 'particular description' of the things to be seized.'" (Cite omitted).

The warrant in the present case authorized, even contemplated, a general search, and that is precisely what occurred. Only specificity in the warrant, and not the presence of the judge at the search, could have provided an adequate guarantee that the scope of the search would be limited to reasonable proportions. The particularity requirement of the Fourth Amendment is designed to insure

that the lawful limits of the contemplated search are fixed at the outset. The warrant in this case, however, placed no boundaries beyond which the search could not proceed nor did it place any limitation on what could be seized. Rather, the language of the warrant was so open-ended and flexible that nothing at petitioner's store was beyond the scope of the warrant.[18]

Furthermore, under the Fourth Amendment, the warrant scheme serves an important informational and notice purpose and the particularity requirement plays a substantial role in furthering that purpose. The judicial warrant assures the person whose property is to be searched or seized of the legality of the intrusion; of the purpose of the search; *of the scope, object and lawful limit of the search; and of the point beyond which the search may not lawfully proceed. Michigan* v. *Tyler,* 436 U.S. 499, 507-508 (1978); *Marshall* v. *Barlow's, Inc., supra,* at 436 U.S. 323; *United States* v. *Chadwick, supra,* at 433 U.S. 9; *Camara* v. *Municipal Court, supra,* at 387 U.S. 532. This important purpose of a warrant can only be fulfilled in a meaningful way if the warrant describes with particularity the items to be seized and only if that description is part of the warrant at the commencement of the search.

The Fourth Amendment mandates in plain and precise language that " . . . no warrants shall *issue,* but upon probable cause . . . and particularly describing the . . . things to be seized." (Emphasis added). It does *not* say, "no warrants shall issue, but upon probable cause . . . and particularly describing the things to be seized, unless the judge who issues the warrant is to be present when it is

[18] The seizure of mannequins, clothing, tear gas cannisters, business records, rubber goods and a ring toss game, ostensibly under authority of this warrant, amply demonstrates this point.

executed for the purpose of deciding which items are to be seized." Nor does it say that a warrant which lacks particularity may issue if, after the search and seizure, a specific description of the items that were seized is added to the warrant. The suggestion that a general warrant may be upheld if the judge who issued it participates in its execution or if, after the search and seizure under it, a specific description of the items seized is added to it, is not only unfaithful to the unambiguous language of the Fourth Amendment but it demonstrates the timeliness today of the admonition first given by this Court long ago in *Boyd* v. *United States,* 116 U.S. 616 at 635 (1886):

> "It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. . . .
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> " . . . It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon."

In the present case, there issued a warrant which did not particularly describe the things to be seized, in violation of the clear language of the Fourth Amendment. As a result, the petitioner's motion to suppress the evidence obtained under authority of that warrant should have been granted by the courts of New York. Since it was not, and since petitioner's conviction thereby resulted, it is the duty of this Court to correct this constitutional error by reversing petitioner's conviction.

III.

THE JUDGE'S EXAMINATION AT PETITIONER'S STORE OF SMALL PORTIONS OF EACH OF HUNDREDS OF FILMS AND PUBLICATIONS WAS AN INSUFFICIENT BASIS UPON WHICH TO ORDER THEIR SEIZURE.

As has been already noted in this brief, this Court has demanded scrupulous adherence to stringent procedural requirements by the states when they exercise the search and seizure power in the course of enforcing laws prohibiting the dissemination of obscene materials. *Marcus, supra; A Quantity of Books, supra; Lee Art Theatre, supra; Roaden, supra; Heller, supra.* In fulfillment of its constitutional obligation to uphold the First and Fourteenth Amendments in the cases brought before it, this Court has refused to uphold any state procedure which lacks the necessary safeguards "to assure nonobscene material the constitutional protection to which it is entitled. . . ." *Marcus, supra,* at 367 U.S. 731. Thus, this Court has insisted upon procedures designed to focus searchingly on the question of obscenity prior to seizure of expressive material. *Marcus, supra; A Quantity of Books, supra; Lee Art Theatre, supra.* The present case is one in which the procedure employed for the seizure of allegedly obscene materials was constitutionally defective at every step of the way, for, aside from the constitutional deficiencies that have already been outlined in the foregoing pages, the method by which Judge O'Connor made his on-the-spot determination as to what materials should be seized from petitioner's store was neither adequate to protect nonobscene material nor designed to focus searchingly on the question of obscenity.

In the present case, Judge O'Connor ordered the seizure of all copies of hundreds of films, magazines and books without having inspected a single publication in its entirety and without having viewed a single film in its entirety. Indeed, his "inspection" of the materials was not an inspection at all, but rather consisted entirely of hasty and superficial glances at small fragments of the publications and films which he ordered removed from the marketplace. With respect to the films being exhibited to the public in the booth area of petitioner's store, he devoted two to three minutes to an examination of a small part of each film (Tr. 97). He spent two to five minutes viewing fragments of the films being exhibited to the public in the two rear rooms of the petitioner's store (Tr. 16-17; 98). In the case of each of the hundreds of books and magazines which he ordered seized, it took the judge between two and ten seconds to glance at no more than a half dozen pages of each publication and to determine the question of constitutional law presented by each publication—whether there was probable cause to believe that it was outside the protection of the First Amendment (Tr. 98). With respect to the films located behind the glass case in the counter area of the petitioner's store, the judge did not view even a single frame of any of the 200-foot films; rather, he determined that all of them were obscene solely on the basis of looking at the small still photograph on each of the boxes in which the films were contained (Tr. 36-38, 123-124).

Moreover, throughout the entire episode, the judge applied a definition of obscenity which he was unable to recite at the motion hearing, but which was sufficiently flexible to bring within its dragnet articles of clothing, which he found to be obscene because the clothing was displayed in such a way as "to arouse sexuality," in that it was uncom-

monly "frilly" and not the type he ". . . would find [his] wife buying" (Tr. 99-104). Nor, petitioner submits, was the judge acting as a neutral and detached magistrate when he made his determinations of obscenity at the petitioner's store. Rather, he had joined forces with the police department and prosecutor's office in conducting a massive raid on the petitioner's business establishment, a raid in which he was a full and zealous participant. But, putting aside the question of the judge's neutrality and disregarding the question as to whether the judge even knew the correct definition of obscenity,[19] still the judge's hasty examination of small fragments of the materials seized from petitioner's store did not constitute a focusing search on the question of obscenity and could not have formed either an appropriate or logical basis on which to rest a finding of probable obscenity.

Under this Court's decision in *Miller* v. *California*, 413 U.S. 15, 24 (1973), a work may be found obscene only if the three-pronged test set forth in that decision is met:

> "(a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest, [citation omitted]; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value."

[19] Under New York law, a person need not be a lawyer in order to occupy the office of town justice. *See* N.Y. Uniform Justice Court Act, Art. 1, §105 (McKinney Supp. 1978-1979). As it happened, the judge who directed the search and seizure in this case was not a lawyer. *See* letter attached as Exhibit A to this brief, *infra*, at 51.

Because the first and third prongs of the *Miller* test expressly require a consideration of the work as a whole, it necessarily follows that a finding of probable cause to believe that a particular work meets those criteria cannot logically be based upon a mere inspection of fragmented and isolated parts of the work. At most, an inspection of a small part of a publication or film could give a magistrate cause to believe that the "work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law," the second prong of the *Miller* test. But it would be hopelessly contradictory for a magistrate to conclude from a brief inspection of a small fragment of a particular film or publication that probably "the average person . . . would find that the work, *taken as a whole,* appeals to the prurient interest," the first prong of the *Miller* test. Certainly, it would defy reason and logic for a magistrate, who has glimpsed briefly only at a minute portion of a publication or film, to conclude that there is probable cause to believe that the "work, *taken as a whole,* lacks serious literary, artistic, political, or scientific value," the third criterion which, under *Miller*, must be met before a work may be deemed obscene. *See United States* v. *Tupler*, 564 F. 2d 1294 (9th Cir. 1977). Only by considering a publication or film as a whole can a magistrate properly determine whether the work is probably beyond the protection of the First Amendment and thereby fulfill his constitutional duty to focus searchingly on the question of obscenity.[20]

Furthermore, the approval of a more relaxed standard of judicial scrutiny as a prerequisite to a lawful seizure of allegedly obscene materials would afford insufficient

[20] Compliance by magistrates with this requirement is neither difficult nor unduly burdensome in light of the First Amendment values at stake.

protection to nonobscene material. There is undoubtedly a vast bulk of materials available in the marketplace which is entitled to full constitutional protection but which, nevertheless, might satisfy the second component of the *Miller* test of obscenity, because it depicts or describes sexual conduct. In a large number of cases, therefore, it is only a proper application of the first and third prongs of the *Miller* formulation which will separate works that legitimately deal with "sex, a great and mysterious motive force in human life, [which] has indisputably been a subject of absorbing interest to mankind through the ages," *Roth* v. *United States*, 354 U.S. 476, 487 (1957), from those works that treat sex in a manner which places them beyond the protection of the First Amendment. For this reason, the approval of a procedure, such as the one followed in this case, which is sufficient to enable a magistrate to determine only that the second part of the *Miller* test may be satisfied, but which is clearly insufficient to enable him to make an informed and deliberate determination as to whether the first or third prongs of the *Miller* test are met would place in jeopardy a large category of protected materials. The approval of such a procedure would transform the requirement of a focusing search on the question of obscenity, fashioned by this Court as the "sensitive tool" [21] by use of which magistrates can locate the "dim and uncertain line" [22] which often separates obscenity from constitutionally protected speech, into an undiscriminating blunt instrument.[23]

[21] *Speiser* v. *Randall*, 357 U.S. 513, 525 (1958).

[22] *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58, 66 (1963).

[23] Permitting seizure of an allegedly obscene book or film on the basis of a hasty and superficial judicial examination of a small fragment of the book or film would also signal a return to the principle of *Regina* v. *Hicklin* [1868] L.R. 3 Q.B. 360, rejected by this Court in *Roth, supra*, that obscenity is to be judged not by considering the effect of the work as a whole but by the effect of isolated excerpts of the work.

In the present case, the seizure of publications and films was effected under a constitutionally defective procedure which was neither designed to focus searchingly on the question of obscenity nor adequate to protect nonobscene materials. The seizure, therefore, violated petitioner's First, Fourth and Fourteenth Amendment rights, for which reason the petitioner's conviction, based upon evidence unlawfully seized, should be reversed by this Court.

IV.

THE MASSIVE SEIZURE OF PUBLICATIONS, FILMS AND PROJECTORS VIOLATED PETITIONER'S FIRST, FOURTH AND FOURTEENTH AMENDMENT RIGHTS.

This Court has had occasion to condemn, as impermissible prior restraints on the distribution of materials presumptively protected by the First Amendment, seizures of multiple copies of allegedly obscene materials under search warrants which issued on an *ex parte* basis. *Marcus, supra; A Quantity of Books, supra.* This Court has properly determined that only a judicial finding of obscenity following an adversary hearing assures the "necessary sensitivity to freedom of expression" [24] which is a prerequisite to the imposition of any valid final restraint on the distribution of expressive materials. And the Court has recognized that the seizure of all copies of a particular film or publication represents the most effective and repressive final restraint possible. *Marcus, supra,* at 367 U.S. 736; *A Quantity of Books, supra,* at 378 U.S. 210. Consequently, such a seizure is unlawful unless it is preceded by an adversary hearing on the question of obscenity. *Id.*

[24] *Freedman* v. *Maryland*, 380 U.S. 51, 58 (1965); *See also, United States* v. *Thirty-Seven Photographs*, 402 U.S. 363, 367 (1971).

In the present case, the conduct of the eleven state officials who raided petitioner's store far exceeded that which could have even arguably furthered any legitimate law enforcement purpose. The seizure of films and publications at petitioner's store was not limited to the single evidentiary copy of each needed for prosecution. Rather, the state officials, in a systematic and calculated fashion, seized every available copy of each publication and film believed to be obscene. The only purpose served by this mass seizure was an illegal purpose—to put an abrupt and complete halt to the circulation of numerous books, magazines and films. As this Court noted in *Heller, supra,* at 413 U.S. 491-492:

> ". . . Courts will scrutinize any large-scale seizure of books, films or other materials presumptively protected under the First Amendment to be certain that the requirements of *A Quantity of Books* and *Marcus* are fully met . . .
>
> ". . . [S]eizing films to destroy them *or to block their distribution or exhibition* is a very different matter from seizing a single copy of a film for the bona fide purpose of preserving it as evidence in a criminal proceeding. . . ." (Emphasis added).

Here, the purpose of the state officials was clear. When they entered petitioner's store under a warrant which specifically identified only two films, they already had in their possession evidentiary copies of those films. Nevertheless, they seized every other copy of each of those films that could be found. They confiscated all of the petitioner's film projectors, a seizure akin to and no less repressive than the seizure of a printing press, for it imposed a prior restraint on the exhibition of *any* film by the petitioner, regardless of content.[25] During the six-hour search and seizure, they effectively padlocked petitioner's entire premises by harassing potential customers, and by stationing uniformed guards both inside and outside of the store.[26] Finally, they carted away every copy of every film found in petitioner's store and every copy of a substantial portion of the books and magazines in petitioner's store, more than 860 films and publications in all. The search and seizure was clearly unlawful under the First and Fourteenth Amendments because it imposed a prior restraint on the circulation and exhibition of numerous films and publications.

As a consequence, the petitioner's conviction ought to be reversed, just as the judgments in *Marcus* and *A Quantity of Books* were reversed by this Court. In those cases, both involving proceedings instituted to obtain a judgment ordering the destruction of obscene materials, this Court reversed the judgments in order to vindicate the First and Fourteenth Amendment rights that had been abridged by the mass seizures of allegedly obscene materials. As this Court stated in *A Quantity of Books, supra, at* 378 U.S. 213:

> ". . . Here, as in Marcus, 'since a violation of the Fourteenth Amendment infected the proceedings, in order to vindicate appellants' constitutional rights' [cite omitted] the judgment resting on a finding of obscenity must be reversed."

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[25] See *Dexter* v. *Butler,* 559 F. 2d 1286, 1293 (5th Cir. 1977), *aff'd. on rehearing,* —— F. 2d —— (1978); *Ellwest Stereo Theatre, Inc.* v. *Byrd,* 404 F. Supp. 33, 51 (S.D. Tex. 1975); *Bongiovanni* v. *Hogan,* 309 F. Supp. 1364 (S.D. N.Y. 1970).

[26] See *Maguin* v. *Miller,* 433 F. Supp. 223 (D. Kan. 1977); *P.A.B., Inc.* v. *Stack,* 440 F. Supp. 937 (S.D. Fla. 1977).

Since a violation of the Fourteenth Amendment infected the proceedings in the present case as well, this Court should accord the petitioner here equal treatment by reversing the judgment of conviction.

Moreover, the petitioner's conviction ought to be reversed because the mass seizure of materials from its store violated its Fourth Amendment rights as well as its First Amendment rights. This is the teaching of *Roaden* v. *Kentucky*, 413 U.S. 496 (1973). In that case, this Court found the warrantless seizure of a film being exhibited to the general public to be violative of the Fourth Amendment. An analysis of *Marcus, supra, A Quantity of Books, supra,* and *Lee Art Theatre, supra,* led this Court to conclude that a search or seizure which effects a prior restraint on the right of expression ". . . calls for a higher hurdle in the evaluation of reasonableness" under the Fourth Amendment. *Roaden, supra,* at 413 U.S. 504. In *Roaden,* that hurdle could not be overcome.

In the present case as well, the massive seizure which occurred cannot withstand the close scrutiny demanded in assessing its reasonableness under the Fourth Amendment. Indeed, in order to sustain the mass seizure in this case under the Fourth Amendment, it would be necessary for this Court to conclude that a search and seizure which is clearly in violation of the First Amendment may, nevertheless, constitute a reasonable search and seizure within the meaning of the Fourth Amendment. That this Court would ever arrive at such a conclusion is unthinkable. Because the massive seizure in this case violated the Fourth Amendment as well as the First, the petitioner's motion to suppress should have been granted by the trial court and the petitioner's conviction, based on constitutional error, should be reversed by this Court.

CONCLUSION

The record below demonstrates an assault of monumental proportions upon clearly established principles of search and seizure protections guaranteed by the First, Fourth and Fourteenth Amendments.

Under the pretext of seeking two films which were already in their possession, the law enforcement authorities of New York sought to convert what was essentially a warrantless rummaging of private premises and effects into the appearance of a structured search under the authorization of a precise warrant.

They bypassed the necessity for particularly identifying the items to be seized by appending fourteen pages of a precise catalog of seized materials to a "warrant", originally issued and executed in blank, long after the government entry onto petitioner's premises, the arrest of an employee, and the search for, and seizure of, massive amounts of materials had been completed.

By the simple but dangerous device of transporting a compliant magistrate on wheels to the place of the search to give the illusion of quasi-judicial imprimatur to the massive rummaging of the police, they dispensed with the requirement that probable cause must be shown as a prerequisite to a search with or without a warrant.

Nor did they demonstrate any concern for the clear, constitutional imperative that, where a search and seizure involves materials claiming First Amendment protection, the issuing magistrate must focus searchingly on the obscenity of such materials in advance. Rather, they sought to justify the massive seizure of hundreds of publications

and films by a superficial examination characterized by failure to examine any of the materials as a whole or in their entirety, made by a judicial figure whose identification with the procedures and purposes of the searching officers was unwavering, and whose standards of obscenity by which he judged the materials before him, are unknown to the annals of law.

That the record in this case demonstrates such callous disregard for civilized limitations upon governmental behavior by the law enforcement authorities of New York is disturbing enough. But that every judicial tribunal of that state, from trial level through the highest appellate stages, would sanction such usurpation of basic constitutional principle, defies understanding, to say the least.

It is ironic that in the context of a massive seizure of materials arguably protected by the First Amendment, where search procedures "call for a higher hurdle in the evaluation of reasonableness" [27] than searches involving other kinds of evidence, and where the particular identification in warrants of things to be seized "is to be accorded the most scrupulous exactitude",[28] the seeds of full-scale emasculation of basic Fourth Amendment guarantees are now presented to this Court for review.

For if the judicial sanction of this search procedure by the courts of New York should be perpetuated by this Court, then the clear command of the Fourth Amendment which interposes between the police and the privacy of our citizens an impartial magistrate, a prior showing of probable cause, and a particular description of items to be seized, will become a mockery. From that day forward,

[27] *Roaden* v. *Kentucky*, 413 U.S. 496, 504 (1973).

[28] *Stanford* v. *Texas*, 379 U.S. 476, 485 (1965).

pseudo-magistrates making house calls, arm in arm with searching police officers, blank warrants in their fists, will justify their rummaging efforts by after-the-fact identification of what the search has turned up. Thus will the Fourth Amendment, and the First Amendment in the process, be reduced to rubble.

Against such a consequence, this Court should resolutely set its face. The conviction should be reversed.

Respectfully submitted,

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January, 1979

APPENDIX

United States Constitution, Amendment I:

"Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ."

United States Constitution, Amendment IV:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

United States Constitution, Amendment XIV:

". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law. . . ."

New York Penal Law, Section 235.00:

§ 235.00 *Obscenity; definitions of terms.*

The following definitions are applicable to sections 235.05, 235.10 and 235.15:

1. 'Obscene.' Any material or performance is 'obscene' if (a) the average person, applying contemporary community standards, would find that considered as a whole, its predominant appeal is to the prurient interest in sex, and (b) it depicts or describes in a patently offensive manner, actual or

simulated: sexual intercourse, sodomy, sexual bestiality, masturbation, sadism, masochism, excretion or lewd exhibition of the genitals, and (c) considered as a whole, it lacks serious literary, artistic, political, and scientific value. Predominant appeal shall be judged with reference to ordinary adults unless it appears from the character of the material or the circumstances of its dissemination to be designed for children or other specially susceptible audience.

2. 'Material' means anything tangible which is capable of being used or adapted to arouse interest, whether through the medium of reading, observation, sound or in any other manner.

3. 'Performance' means any play, motion picture, dance or other exhibition performed before an audience.

4. 'Promote' means to manufacture, issue, sell, give, provide, lend, mail, deliver, transfer, transmute, publish, distribute, circulate, disseminate, present, exhibit or advertise, or to offer or agree to do the same.

5. 'Wholesale promote' means to manufacture, issue, sell, provide, mail, deliver, transfer, transmute, publish, distribute, circulate, disseminate or to offer or agree to do the same for purposes of resale.

6. 'Simulated' means the explicit depiction or description of any of the types of conduct set forth in clause (b) of subdivision one of this section, which creates the appearance of such conduct.

7. 'Sodomy' means any of the types of sexual conduct defined in subdivision two of section 130.00

provided, however, that in any prosecution under this article the marital status of the persons engaged in such conduct shall be irrelevant and shall not be considered."

New York Penal Law, Section 235.05:

"§ 235.05 *Obscenity in the second degree.*

A person is guilty of obscenity in the second degree when, knowing its content and character, he:

1. Promotes, or possesses with intent to promote, any obscene material; or

2. Produces, presents or directs an obscene performance or participates in a portion thereof which is obscene or which contributes to its obscenity.

Obscenity in the second degree is a class A misdemeanor."

New York Criminal Procedure Law, Section 710.70(2):

"§ 710.70 *Motion to suppress evidence; orders of suppression; effects of orders and of failure to make motion*

• • • • •

2. An order finally denying a motion to suppress evidence may be reviewed upon an appeal from an ensuing judgment of conviction notwithstanding the fact that such judgment is entered upon a plea of guilty."

STATE OF NEW YORK
OFFICE OF COURT ADMINISTRATION
270 BROADWAY
NEW YORK, N.Y. 10007

RICHARD J. BARTLETT
CHIEF ADMINISTRATIVE JUDGE

MICHAEL R. JUVILER
COUNSEL

January 15, 1979

Lita Weiss, Esq.
Berkman, Gordon, Kancelbaum
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2121 The Illuminating Building
55 Public Square
Cleveland, Ohio 44113

Dear Ms. Weiss:

Your inquiry of January 4, 1979, addressed to the Clerk of the Court, Appellate Division, Third Judicial Department has been referred to this Office for reply.

Our files indicate that Honorable John O'Connor and Honorable Frank L. Giza, Justices of the Town Court, Town of Waywayanda, Orange County, New York, occupied that office during the year 1976.

Neither justice is a lawyer but both have fulfilled the training requirements established by statute and by the Office of Court Administration.

I trust this information will be of assistance to you.

Sincerely,

William Bulman

William Bulman
Deputy Counsel

WB:mg

Exhibit A